SUPREME JUDICIAL COURT

SUFFOLK, SS. FAR-

Appeals Court No. 2019-P-1772

SUZETE B. COSTA

Plaintiff-Appellant,

v.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Defendant-Appellee.

On Appeal from a Final Order of The Commonwealth of Massachusetts Employment Relations Board No. SUPL-17-6154

PLAINTIFF-APPELLANT SUZETE B. COSTA'S APPLICATION FOR FURTHER APPELLATE REVIEW

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November 16, 2020

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PRELIMINARY STATEMENT

As of 2018, union members accounted for 13.7% of the wage and salary workers in Massachusetts (an estimated 464,000 Massachusetts workers)[1]. These workers pay dues and expect and need to be represented fairly and competently by their unions--especially as the unions are their exclusive representatives[2]. The duty of a union to do so is well recognized both under State and Federal law. See *National Ass'n of Gov't Employees v. Labor Relations Comm'm*, 38 Mass. App. Ct. 611, 613 (1995). Indeed, as the 9th Circuit noted, "[t]he duty of fair representation is the *quid pro quo* for the union's right to exclusive representation; it protects employees in the minority from arbitrary discrimination by the majority union." *Laborers & Hod Carriers, Loc. No. 341 v. NLRB*, 564 F.2d 834, 839-40 (9th Cir. 1977).

Under extant law, a union breaches its duty of fair representation by engaging in conduct which is arbitrary, discriminatory or in bad faith. It is well established that a union's mere negligence, alone, does not rise to the level of arbitrary conduct. On the other hand, perfunctory or arbitrary handling of a grievance can constitute more than mere negligence

[1] See U.S. Bureau of Labor Statistics, New England Information Office, Union Membership in Massachusetts and Connecticut—2018, www.bls.gov/regions/new-england.

[2] In many instances, such as in the case of public employees like Appellant, Union membership is compulsory.

and thus violate a union's duty of fair representation. Similarly, a union's failure to provide information relating to a bargaining unit member's grievance also may violate this duty.

This case involves a grievance filed on behalf of Appellant--an employee of the Trial Court and member of the Union since 1998. Over the course of the grievance process that spanned three years, the record demonstrates that the Union deliberately ignored the applicable provisions of the CBA, ignored Appellant's requests for information and mislead her and concealed information from her. Following the Step 3 hearing--which was only scheduled after Appellant filed a charge before the DLR--the record likewise makes plain that the Union without rational basis to do so, disposed of the grievance for a fraction of its value, without Appellant's knowledge or assent, and upon terms that were contrary to what the Union represented to Appellant that the Union was seeking. Despite this, while not condoning the Union's behavior, the CERB held that given the low bar set for the Union's representations of its members that the Union's conduct did not rise to the level of a breach of the duty of fair representation. Applying the same low standard, the Appeals Court affirmed.

As the General Counsel of the NLRB has recently noted[3], "a union's failure to communicate decisions related to a grievance or to respond to inquires for information or documents by the charging party, in the General Counsel's view, constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation." As the General Counsel explains, "[t]his is so irrespective of whether the decisions alone, would violate the duty of fair representation." In this case, the Union not only failed to communicate with Appellant without excuse or explanation but misrepresented the status of its negotiations with the Trial Court and settled Appellant's grievance behind her back on unfavorable terms without so much as consulting Appellant.

This application presents this Court an opportunity to protect the rights of the hundreds of thousands of union members of this Commonwealth by confirming that the union's duty of fair representation requires a Union to timely and honestly respond to requests for information from its membership, timely pursue grievances in accordance with the CBA, and to meaningfully consult with its membership before resolving independent grievances. These standards, far from imposing an undue burden

[3] See MEMORANDUM GC 19-01, NLRB Office of General Counsel, October 24, 2018.

on the unions, are simply the minimum that is expected of any representative or fiduciary and are necessary to ensure that this Commonwealth's union membership is adequately protected.

I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, Appellant Suzete Costa requests that this Court grant further appellate review of the final decision of the Commonwealth Employment Relations Board ("CERB"), and the subsequent October 26, 2020 Opinion of the Appeals Court dismissing Appellant's appeal.

II. STATEMENT OF PRIOR PROCEEDINGS RELEVANT TO THIS APPEAL

This is an appeal pursuant to M.G.L. c. 150E, § 11 by Appellant from a final decision of the CERB that summarily affirmed a dismissal of a charge of a prohibited practice by an investigator of the Department of Labor Relations ("DLR"). On August 4, 2017, Appellant filed a prohibited practice charge with the DLR alleging that the Office and Professional Employees International Union, Local 6 ("Union") violated its duty of fair representation by failing to regularly and honestly communicate with Appellant and surreptitiously and unfavorably "resolving" Appellant's grievance against her employer, the Massachusetts Trial Court, without her knowledge or consent and in a manner contrary to the Union's representations to her both before and following the settlement.

The Department conducted an in-person investigation of Appellant's allegations on October 31, 2017. (Add. X). On November 27, 2017, the Investigator issued an order dismissing the charge. (Add. X).

Following the Investigator's dismissal, Appellant sought a review of this order by filing a request with the CERB pursuant to Department Rule 456 CMR 15.05(9). On February 27, 2018, the CERB issued a final order affirming the dismissal of Appellant's charge. (Add. X) Thereafter, on March 26, 2019, Appellant requested judicial review by this Court of the final order of the CERB in accordance with M.G.L. c. 150E, § 11.

On October 26, 2020, the Appeals Court issued its decision affirming the CERB's dismissal. In its decision, the Appeals Court acknowledged that the grievance process "took considerably longer than that contemplated by the grievance procedure." More importantly, the Appeals Court further found that the Union settled Appellant's grievance without her knowledge or assent and, in fact, "failed to involve [Appellant]in the negotiation" altogether. Despite these findings, however, the Appeals Court found that the Union's conduct did not breach its duty of fair representation to Appellant.

III. STATEMENT OF FACTS RELEVANT TO THIS APPEAL

Since 1998, Appellant has been employee of the Office of Court Management for the Massachusetts Trial Court ("Trial

Court") and a dues paying member of the Union. (R.A. 10). On February 1, 2013, Appellant received notice that the Office of Court Management internally posted the position of Procurement Coordinator (the "Position") to Massachusetts Trial Court Employees who were located in the Office of Court Management. (Id.). As Appellant was fully qualified for the Position, Appellant applied for the Position and was interviewed on March 18, 2013. (Id.). Prior to the commencement of the interview and any discussion of Appellant's qualifications, however, Appellant was informed by Diane Wholley ("Wholley") that the job was not for Appellant, but rather for someone that had been impermissibly "preselected" as he had been working in that capacity. (Id.).

Following Appellant's non-selection, the Union, at Appellant's request, filed a grievance. (R.A. 28). As a result of the grievance, the Trial Court agreed to "redo" the hiring process. (R.A. 32). Appellant was thereafter reinterviewed by Wholley on October 30, 2013. (R.A. 12). After the interview, Appellant did not hear anything from the Union for several months despite her regular attempts to obtain an update. (R.A. 34). In March, 2014, she was informed by the Trial Court's attorney that the Trial Court was not sure "what the outcome of the interview was either" and would investigate the matter and "let her know" (R.A. 44). Thereafter, another eight months

passed without response prompting Appellant to hire an attorney to send a letter demanding a response from both the Union and Trial Court. (R.A. 46). In response to this letter, the Trial Court informed Appellant on December 23, 2014 that the Trial Court considered the matter closed as, without informing Appellant, the Trial Court had selected someone else for the position. (R.A. 16). Appellant requested that the Union immediately file a subsequent grievance which the Union eventually did in late January, 2015. (R.A. 49).

Although in accordance with the collective bargaining agreement ("CBA") a Step 1 hearing was supposed to be scheduled within ten days, due to the Union's dilatory conduct, a hearing was not scheduled until July 9, 2015--nearly six months after the filing of the grievance. Despite the delay, Appellant felt confident of success at the hearing as the Union informed Appellant that it had uncovered evidence that the Trial Court, in order to insure that the person that it had "preselected" for the position was the successful candidate, had altered the scores to falsely show that the Trial Court's favored candidate had received one point more than Appellant. (R.A. 14). Given the Trial Court's actions, Appellant was assured by the Union that if the matter went to arbitration that she would prevail as any "reasonable person" would see that the "numbers were fudged". (Id.).

The Trial Court denied Appellant's grievance at Step 1 and again at Step 2 in late October, 2015. (R.A. 69). Following the Step 2 hearing, the Union indicated to Appellant that it had filed for a Step 3 Hearing. (R.A. 71). Although in accordance with the CBA, the Step 3 Hearing was to be scheduled within 15 days, no hearing was scheduled in 2015 or in the first four months of 2016. (R.A. 15). As Appellant, despite numerous written requests, had heard nothing from the Union for months, Appellant filed a charge against the Union with the DLR on May 3, 2016. (R.A. 15). This filing prompted the Union to schedule the Step 3 Hearing on July 14, 2016.

Prior to the Step 3 Hearing the Union attempted to pass the blame for the delay to the Trial Court and informed Appellant that the Union was "very frustrated" with the Trial Court for failing to schedule the hearing in a timely manner and in accordance with the CBA. (R.A. 16). The Union reassured Appellant, however, that Appellant's grievance was meritorious as the Trial Court's changing of the scores to favor its preselected candidate demonstrated that the process was "dishonest and bias" from the start. (Id.).

The Step 3 Hearing was eventually conducted on July 14, 2016. At the hearing, the Union began by acknowledging, contrary to its earlier representations to Appellant, that the Union shared responsibility for the delays. (R.A. 17).

Thereafter, the Union questioned Wholley concerning Appellant's non-selection. (Id.). During the course of her responses, Wholley acknowledged that the scores were changed to give the other candidate the "edge" as he was already in the fiscal department. (Id.). The Union then asked Wholley if she was "bias" to which Wholley responded "you can say that". (Id.). As the questioning continued, Wholley stated that she was "sick of the process" and asked Appellant why Appellant had to go to fiscal and could not just follow her own "career path" and seek promotion in her "own department". (Id.).

Appellant requested that the Union informed her of the results of the Step 3 Hearing by email on August 9, 2016. (R.A. 90). In response, the Union indicated the following day that it had not received a response from the Trial Court, but had had discussions with the Trial Court about placing Appellant at the same level of the subject position in a job in Facilities. (R.A. 18). In order to place Appellant at the "same level" she would have to be placed at least Level 16, Step 5. (Id.). The Union indicated that it was very confident that it could work this out. (R.A. 92). Appellant responded that she would consider a position as a Procurement Coordinator in Facilities Management Region 5 at Level 17, Step 8 as this is the Level and Grade that Appellant would have been at if she had received the position in

question. (Id.). Appellant indicated that the issue of back pay would have to be addressed as well". (R.A. 94).

Over the next several months, Appellant reached out to the Union repeatedly by email requesting an update. On the rare occasion that the Appellant was able to get a response from the Union, the Union informed her that the Union was working to get her a comparable position in the Facilities Department and was working to get her the back pay that she was requesting. (R.A. 98; R.A. 117). This continued until February, 2017, when Appellant heard, much to her surprise, from a co-worker that her grievance had been resolved. Appellant immediately contacted the Union and requested the status. (R.A. 113). In response the Union told Appellant on February 10, 2017 that the grievance had not been resolved, but that the Union was going to talk with the Trial Court to get it done. (R.A. 20). Following this conversation, Appellant sent an e-mail to the Union, asking for verification of the position, level, grade, location and manager of the job being discussed and an explanation of how the back pay issue was going to be addressed. (R.A. 117).

For the next month and a half, Appellant consistently emailed the Union requesting an update. In response, the Union claimed that it was still attempting to work out the details. Finally, after Appellant was once again forced to threaten legal action to get a response, the Union forwarded to Appellant

without comment on March 29, 2017 the terms of the settlement that had been reached in November, 2016. As set forth in this e-mail, the settlement was as follows: (A) The Trial Court agreed to reclassify Appellant from an Administrative Assistant at Level 14, Step 8 ($68,290.00 annually) to an Administrative Coordinator at Level 15, Step 7 ($70,942.00 annually) as of February 19, 2017; (B)The Trial Court agreed to pay Appellant back pay in the amount of $607.59; (C) The Trial Court agreed that Appellant's anniversary date for future salary increases would be November 28, 2016; and (D)The Union agreed not to proceed to arbitration. (Id.).

Appellant did not agree to the terms of the above settlement, was not consulted by the Union prior to entering into the settlement, and was not, in fact, even informed that a settlement had been reached. (R.A. 22). The increase in level that Appellant received was the minimum promotion that she could have received as she must, under the Trial Court's regulations, receive at least an additional $1,000.00 per annum when promoted. (Id.). This increase was certainly not at the "same level" as or "comparable" to the position that she was seeking as the position that she had interviewed for at Level 16/17. (Id.). In regards to back pay, as the Union was well aware, Appellant was owed $37,428.84--over 61 times greater than the back wages that Union accepted on her behalf.

On August 4, 2017, Appellant filed a prohibited practice charge with the DLR alleging that the Union had violated M.G.L. c. 150E, §10(b)(1). (R.A. 3). Following the filing of the charge, an in-person investigation was conducted on October 31, 2017 before Investigator Jennifer Maldonado-Ong Esq. (Add. 29). During the course of the in-person investigation, the Union was unable to offer any explanation for its failure to proceed with Appellant's grievance in a timely manner or failure to keep Appellant informed of the status of her grievance. The Union was likewise unable to articulate any reason why it did not consult with Appellant concerning the proposed settlement or offer any rational theory as to why it agreed to a promotion that is several steps lower than the position that Appellant sought. Further, the Union was unable to offer any reason why it agreed to the minimalistic back pay figure (which amounted to less than 2% of the amount of Appellant's claim for back wages).

IV. STATEMENT OF POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether a union's failure to communicate decisions related to a grievance or to respond to inquiries for information and documents by a charging party, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation.

2. If this application is allowed, whether the Appellate Court erred in affirming the decision of the CERB.

V. STATEMENT INDICATING WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

A. The Appellate Court Erroneously Applied Too Low A Bar to the Union's Duty of Fair Representation

"A union has a duty to represent its members fairly in connection with issues that arise under a collective bargaining [agreement]." *National Ass'n of Gov't Employees v. Labor Relations Comm'n*, 38 Mass. App. Ct. 611, 613, 650 N.E.2d 101 (1995). In the seminal case of *Air Line Pilots Ass'n , Intern. V. O'Neill*, 499 U.S. 65, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991) the United States Supreme Court described the duty of fair representation as follows:

> The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries. See *Teamsters v. Terry*, 494 U.S. 558, 567–568, 110 S.Ct. 1339, 1346, 108 L.Ed.2d 519 (1990); id., at 584–588, 110 S.Ct., at 1355–1357 (KENNEDY, J., dissenting). Others have likened the relationship between union and employee to that between attorney and client. See id., at 582, 110 S.Ct., at 1353–1354 (STEVENS, J., concurring in part and concurring in judgment). The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith. See, e.g., Restatement (Second) of Trusts § 174 (1959) (trustee's duty of care); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984) (lawyer must render

"adequate legal assistance"); *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 274 (CA2 1986) (directors owe duty of care as well as loyalty).

Massachusetts imposes the duty on the exclusive bargaining representative to represent the interests of all bargaining unit members without discrimination in connection with issues that arise under a collective bargaining agreement and a breach is a prohibited practice under the public sector labor relations law, G.L. c. 150E. *Nat'l Ass'n. of Gov't. Employees (NAGE) v. Labor Relations Comm'n.*, 38 Mass.App.Ct. 611, 613 (1995) (citing Vaca, 386 U.S. at 177. "Unions are permitted 'a wide range of reasonableness' in representing the often-conflicting interests of employees" and are thus "vested with considerable discretion not to pursue a grievance." *Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub. Employees Union*, 407 Mass. 601, 606, 555 N.E.2d 543 (1990), quoting *Baker v. Local 2977, State Council 93, Am. Fed'n of State, County & Mun. Employees*, 25 Mass. App. Ct. 439, 441, 519 N.E.2d 1352 (1988). A union may not, however, "arbitrarily ignore a meritorious grievance or process it in perfunctory fashion." *Vaca v. Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). See *Graham*, 407 Mass. at 606, 555 N.E.2d 543, quoting *Baker*, 25 Mass. App. Ct. at 441, 519 N.E.2d 1352 (union's processing of grievance may not be "improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect"). Thus,

"[a]lthough ordinary negligence may not amount to a denial of fair representation, lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect.'" *Graham*, supra, quoting *Trinque v. Mount Wachusett Community College Faculty Ass'n*, 14 Mass. App. Ct. 191, 199, 437 N.E.2d 564 (1982).

Appellant submits that consistent with the above cited standards, a Union's failure to communicate decisions related to a grievance or to respond to inquiries for information or documents by the charging party constitutes more than mere negligence and, instead, rises to the level of arbitrary conduct unless there is a reasonable excuse or meaningful explanation. By failing to so hold, the Appeals Court has set an improperly low bar for a Union's representation of its membership and put the rights and protections of the membership--who rely on the unions as their exclusive representatives--at risk.

B. This Appeal is Important to this Commonwealth's Over 460,000 Union Members

As noted above, as of 2018, union members accounted for 13.7 percent of wage and salary workers in Massachusetts (an estimated 464,000 Massachusetts workers). These workers, both in the public and private sectors, rely on their Unions, as their exclusive representatives, to represent them both fairly

and in accordance with the same standards that are expected of other fiduciaries. If allowed to stand, by excusing dilatory and arbitrary conduct that would not be deemed acceptable if committed by any other representative or fiduciary, the Court of Appeals decision will harmfully diminish the protections of this Commonwealth's union membership and the faith that they have in their unions.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that this Appeal is appropriate for further appellate review by the Supreme Judicial Court.

Dated: November 16, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Richard B. Reiling, Esq., hereby certify that a copy of this Application for Further Appellate Review was served upon all counsel of record via the eFile-MA system on this 16th day of November, 2020.

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APPENDIX

1. February 27, 2018 Final Decision of the Commonwealth Employment Relations Board.

2. October 26, 2020 Opinion of the Appeals Court Dismissing Appellant's Appeal.

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RE: SUPL-17-6154, Office of Professional Employees International Union, Local 6 and Suzete B. Costa

Dear Mr. Reiling and Ms. Bushey:

The Commonwealth Employment Relations Board (CERB) has reviewed the dismissal of the above-referenced prohibited practice charge by a Department of Labor Relations (DLR) Investigator. The Investigator found no probable cause to believe that OPEIU, Local 6 (Union) had committed a prohibited practice within the meaning of Section 10(b)(1) of M.G.L. c. 150E in connection with a grievance it filed on behalf of Suzete B. Costa (Costa), the Charging Party in this matter. On December 6, 2017, pursuant to Section 11 of the Law and Section 15.05(9) of the DLR's Regulations, Costa requested that the Commonwealth Employment Relations Board (CERB) review the dismissal. The Union filed a response to the request for review on December 13, 2017. After reviewing the investigation record, Costa's arguments on review, and the Union's response, the CERB affirms the dismissal of the charge.

Background

The Union is the exclusive bargaining representative for a unit of administrative employees of the Massachusetts Trial Court (Employer). At all relevant times, Costa was employed as an Administrative Assistant/Secretary I within the Employer's Office of Court Management and was a member of the bargaining unit represented by the Union. The Employer and the Union were parties to a collective bargaining agreement (CBA)

that included a four step grievance procedure culminating in arbitration (Article V), and a provision regarding promotions (Article XI).

In March 2017, the Union and the Employer entered into an agreement to settle a grievance that the Union had filed on Costa's behalf on January 20, 2015 regarding a promotional opportunity that she had first interviewed for in 2013.[1] In return for the Union agreeing not to proceed to arbitration, the Employer agreed to reclassify Costa from an Administrative Assistant at level 14, Step 8, to an Administrative Coordinator at level 15, Step 7. The settlement included $607.59 in backpay.

On August 4, 2017, Costa filed the present charge of prohibited practice. She alleged that the Union had violated its duty of fair representation to her and caused her economic harm by the manner in which it processed and settled her grievance. Specifically, Costa claimed that the Union had unduly delayed and disregarded contractual timelines in processing the grievance through the first three steps of the grievance procedure; failed to communicate with her throughout the process by not answering her emails; failed to notify her that it had decided to settle her grievance short of arbitration;, failed to discuss the terms of the settlement with her ahead of time; and entered into a settlement that she deems inadequate.

Dismissal and Request for Review

The Investigator dismissed the charge in its entirety. Based on the detailed timeline and facts set out in the dismissal letter, the Investigator found that the Union had communicated regularly with Costa, responded to her inquiries and conscientiously filed and investigated Costa's grievance at each stage of the grievance procedure. Further finding that the Union had made a reasoned judgment to settle rather than arbitrate Costa's grievance, the Investigator concluded that the Union had acted lawfully and that its conduct fell within its broad discretionary power "to pursue, settle, or abandon a grievance or prohibited practice charge, so long as the union's conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." Baker v. Local 2977, AFSCME, 25 Mass. App. Ct. 439, 441 (1988)

On review, Costa argues that the Investigator erred when she found that the Union had: 1) timely processed her grievance; 2) regularly communicated with her about the grievance and responded to her inquries; and 3) fairly, conscientiously and reasonably elected to reject arbitration and settle her claim. In response, the Union points to evidence in the investigation record showing that promotional grievances are

[1] The Union actually filed two grievances on Costa's behalf over her non-promotion. The first, filed in 2013, resulted in Costa being re-interviewed for the position in October 2013, due to the Employer's discovery that her first interview had been conducted by one person, rather than a three-person panel as required by Trial Court policy. The grievance at issue in this charge is the one that the Union filed on Costa's behalf in January 2015, after the Employer notified her in December 2014 that she had not been selected for the position.

difficult for employees to win under the terms of the CBA, but despite this, it negotiated a promotion for Costa that included back pay. In the absence of evidence that its conduct was unlawfully motivated, or inexcusably negligent, the Union contends that the Investigator properly dismissed the charge.

Discussion

We affirm the dismissal. The Investigator accurately stated the standards that the CERB applies when analyzing a duty of fair representation allegation. Unions are permitted a wide range of reasonableness in representing the often-conflicting interests of employees. "Consequently, an aggrieved employee, notwithstanding the possible merits of his claim, is subject to a union's discretionary power to pursue, settle or abandon a grievance so long as its conduct is not improperly motivated, arbitrary, perfunctory or demonstrative of inexcusable neglect." Baker v. Local 2977, AFSCME, 25 Mass. App. Ct. at 441 (citations omitted). Accord National Association of Government Employees v. Labor Relations Commission, 38 Mass. App. Ct. 611, 613 (1995) (a union has considerable discretion in determining whether to file a grievance and whether to pursue it through all levels of a contractual grievance-arbitration procedure). In determining whether a union has violated its duty of fair representation, a union need not make either the best judgment or the same judgment as would be reached by the CERB, as long as its conclusion is neither arbitrary nor tainted by some unlawful discriminatory motivation. Salem Teachers Union, Local 1258, 35 MLC 225, 228, MUPL-04-4479 (April 14, 2009). We disagree that the Investigator made factual or legal errors when applying these standards.

Timely Processing of Grievance

Costa contends that the Investigator's dismissal of her charge was erroneous insofar as it was based on her finding that the Union had timely processed Costa's grievance in accordance with the CBA. Costa disputes this finding, arguing that at each stage, the Union failed to meet the deadlines imposed by the CBA and likewise failed to object to the Trial Court's delays. She further contends that she had to hire a lawyer to get the process moving, and that the Union would otherwise have ignored her.

This argument lacks merit for several reasons. First, there is no dispute that, upon notice that the Employer had denied Costa's grievance at Steps 1 and 2, the Union promptly moved the grievance on to the next step of the grievance procedure in accordance with the terms of the CBA. Second, although it is true that the step hearings were held outside of the contractual deadlines set forth in Section 5.04 of the CBA, Section 5.07 of that article expressly permits the parties to waive contractual deadlines by mutual agreement. Where there is no dispute that the grievance hearings went forward, the Investigator's finding that the Union complied with grievance procedure outlined in the contract was not erroneous and does not cause us to otherwise re-examine the Investigator's ultimate decision to dismiss Costa's charge for

lack of probable cause.[2] See Teamsters, Local 437 and James L. Serratore, 10 MLC 1467, 1478, MUPL-2566 (March 21, 1984) (Union's processing of grievance outside of what charging party claimed were contractual guidelines did not violate Law where CERB concluded that contract could reasonably be interpreted to support union's behavior, it was not unusual for grievance processing to take that amount of time, and charging party's rights under CBA were not prejudiced by the conduct).

Communications

Costa also claims that Investigator erred when she premised her dismissal on a finding that the Union had regularly communicated with Costa and responded to her inquiries. Rather, Costa contends that the Union ignored her for months at a time, purposely concealed the terms of the settlement from her, and ultimately settled her case without revealing those terms.

Although the Union did not respond to every one of her emails or discuss its settlement negotiations with her with any detail until the settlement was finalized in March 2017, we agree with the Investigator that the Union's conduct did not violate the Law. The multiple emails that Costa attached to her charge, particularly in the period after her Step 3 hearing on July 14, 2016, reflect Costa's efforts to learn about the progress of her grievance and her frustration with the pace at which the grievance was progressing through the contractual steps.[3] Although it is true that the Union did not respond to each and every one of Costa's emails, the duty of fair representation does require perfection from a union; rather it requires the union to process grievances in a manner that is not perfunctory, grossly negligent or arbitrary. Here, the record reflects that the Union a timely grievance on Costa's behalf in January 2015, represented her at

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[2] As to Costa's claims that she had to hire a lawyer to get the process moving and that the Union would otherwise have ignored her, we take administrative notice of the fact that Costa made the same arguments to a different DLR Investigator in Case No. SUPL-17-5222, which she filed on May 3, 2016. Similar to her claims here, Costa alleged that the Union' violated its duty of fair representation by its delay in scheduling her Step 3 hearing for the January 2015 grievance. The Union and the Employer scheduled a Step 3 hearing while SUPL-17-5222 was pending and Costa argued to the Investigator that this was only due to her filing a charge. The Investigator rejected this argument as speculative and dismissed the charge for lack of probable cause on July 5, 2016. Costa did not file a request for review of the dismissal of SUPL-17-5222, nor does it appear that she made this argument during the investigation of the instant matter. Thus, these arguments are improperly raised to the CERB now. Even if we were to address them, they have no support in this record, and thus are properly rejected as speculative.

[3] The investigation record shows that between August 2016 and March 2017, Costa emailed the Union twenty-three times, and the Union responded to about one-third of those emails.

the step hearings and then took steps to settle the grievance. Although the process was slow, the Union responded to Costa periodically to apprise her of its progress. In the absence of evidence showing that this conduct was the result of personal hostility or that Costa's rights under the CBA were prejudiced, the Union's less-than-perfect response rate to Costa's multiple emails does not violate the Law. Teamsters, Local 437 and James L. Serratore, 10 MLC at 1477-1478 (citing AFSCME Council 93 and Robert W. Kreps, 7 MLC 2145, 2147, MUPL-2043 (May 19, 1981)).

The same rationale applies to the Union's failure to apprise Costa of the terms of the settlement ahead of time. While we do not condone this behavior, without more, our case law makes clear that such conduct does not amount to a breach of the duty of fair representation. NAGE and Jessie Murray, 34 MLC 30, 38, MUPL-03-4445 (October 3, 2007) (union's failure to communicate its decisions concerning a grievance, standing alone, did not constitute a violation of the duty of fair representation) (citing AFSCME Council 93 and Palma, 28 MLC 196, 199, SUPL-2725 (January 4, 2002); AFSCME Council 93 and Kreps, 7 MLC at 2148)).

Settlement

Costa finally disputes the Investigator's conclusion that the Union made a reasoned judgment when deciding to settle her claim instead of pursuing it to arbitration. She points to what she claims were flaws in the second interview process that demonstrate the Employer's bias towards the other candidate. She also emphasizes language in the CBA stating that the "appearance of favoritism" in the hiring process is to be avoided.[4] Costa contends that based on these flaws, the Union was in the position to prove a material violation of the plain language of the agreement. The Union, on other hand, points to language in Article XI of the CBA that has been interpreted by an arbitrator to vest management with considerable discretion with respect to promotions and promotional grievances.[5] Based on the Union's view that it

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[4] Costa contends that Section 4.304(H) of the CBA contains language to this effect. Although both parties submitted portions of the CBA to the Investigator, this provision was not among them. The CERB therefore does not rely upon it.

[5] The Union submitted to the Investigator a copy of Section 11.01, the Promotion provision of the CBA, as well as a copy of a 2015 redacted arbitration award that interpreted this provision. Section 11.01 states in pertinent part:

> [W]hen the qualifications of the applicants, defined as training, skill, ability, experience and other relevant factors are considered relatively equal by the Employer, employees who make application having the most seniority...will be given preference for promotion to positions covered by this Agreement.

In November 2015, an arbitrator interpreted Section 11.01 as reserving a "high level of discretionary authority to determine whether the more senior candidate possessed

was unlikely to prevail at arbitration on the ultimate issue of whether Costa should have been promoted, the Union explains that it opted to settle the grievance, rather than proceed further.

The Investigator did not err when she concluded there was not probable cause to believe that the Union violated its duty of fair representation when deciding to settle this case under the standards set out above. Because the evidence shows that the Union investigated Costa's grievance and considered its merits in light of past arbitration awards, and in the absence of evidence that the Union's conduct was motivated by personal hostility or prejudiced any of Costa's rights under the CBA, we agree that the Union acted within its broad discretion when settling her grievance. Costa's belief that the settlement could have been more generous does not change this result. See NAGE, 34 MLC at 38; Cf. Peabody Federation of Teachers, Local 1289 v. School Committee of Peabody, 28 Mass. App. Ct. 410, 415-416 (settlement by a union short of that to which member claims entitlement does not warrant an individual's intervention in a proceeding by union to enforce an arbitration award against employer unless "there is a claim supported by some showing . . . that the union has sold the member out in some invidious, arbitrary or unfair fashion").

Conclusion

For these reasons, the CERB summarily affirms the Investigator's dismissal of the charge.

Very truly yours,
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

MARJORIE F. WITTNER, CHAIR

KATHERINE G. LEV, CERB MEMBER

JOAN ACKERSTEIN, CERB MEMBER

relatively equal qualifications to the junior candidate." The arbitrator stated therefore that this provision did not confer upon him the authority to decide the "equal qualifications" issue de novo, but rather limited his decision to determining whether the Union had met its burden of proving that the Employer had made a decision that was arbitrary, capricious or in bad faith.

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, § 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c.150E, §11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1772

SUZETE B. COSTA

vs.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff appeals from a final decision of the Commonwealth Employment Relations Board (board), which affirmed the dismissal of her prohibited practice charge against the Office and Professional Employees International Union, Local 6 (union), in connection with a grievance that it filed on her behalf. We affirm.

Background. The plaintiff was employed by the office of court management for the Massachusetts trial court (trial court) and maintained a membership with the union. Seeking a promotional opportunity from her position as an administrative assistant, the plaintiff applied for an internally posted procurement coordinator position within the fiscal affairs department in February 2013. She interviewed for the position

in October 2013.[1] In December 2014, the plaintiff was notified that the trial court had moved forward with a different candidate.[2] In January 2015, the union filed a grievance on the plaintiff's behalf, challenging the hiring decision.

Thereafter, the union and the trial court engaged in the four-step grievance procedure outlined in their collective bargaining agreement (CBA). Following the step 3 hearing in July 2016, the union and the trial court reached a settlement agreement. The union forwarded the terms of the settlement to the plaintiff in March 2017, which included a position reclassification to a higher grade and pay level as well as back wages. The plaintiff did not agree with the terms of the settlement or the lack of communication with her during its formation.

In August 2017, the plaintiff filed a prohibited practice charge with the Department of Labor Relations (DLR) alleging breach of the union's duty of fair representation under G. L. c. 150E, § 10 (b) (1). Following an in-person investigation of

[1] The plaintiff had earlier been informed of her nonselection for the position. Because the initial interview had been conducted by one person, instead of a three-person panel as required by trial court policy, the plaintiff was permitted to reinterview for the position before a three-person panel.

[2] Following the interview, the plaintiff contacted the human resources department several times for an update, ultimately hiring an attorney to contact the union and the trial court on her behalf.

the plaintiff's allegations in October 2017, a DLR investigator dismissed the plaintiff's charge. The board affirmed the dismissal, and the plaintiff appealed.

Discussion. Pursuant to G. L. c. 30A, § 14, review of an administrative agency's decision is "limited to an examination of the record to ascertain if the findings are supported by substantial evidence" (quotation omitted). Goncalves v. Labor Relations Comm'n, 43 Mass. App. Ct. 289, 295 (1997). The threshold for substantial evidence is met if "a reasonable mind might accept [the evidence] as adequate to support a conclusion." Id., citing G. L. c. 30A, § 14. The board's decision will not be set aside unless it "is marred by legal error or is otherwise arbitrary, capricious, or an abuse of discretion." United Steelworkers of Am. v. Commonwealth Employment Relations Bd., 74 Mass. App. Ct. 656, 661 (2009).

In reviewing the administrative record, deference is given to the board's specialized knowledge in interpreting collective bargaining agreements and applicable statutory provisions. See Anderson v. Commonwealth Employment Relations Bd., 73 Mass. App. Ct. 908, 910 (2009), citing Worcester v. Labor Relations Comm'n, 438 Mass. 177, 180 (2002). The board also enjoys broad discretion in resolving complaints through prehearing dismissals. See Quincy City Hosp. v. Labor Relations Comm'n, 400 Mass. 745, 748 (1987).

On appeal, the plaintiff contends that her charge should not have been dismissed because the evidence showed that the union violated its duty of fair representation in resolving her grievance against the trial court. Specifically, she alleges that the union, rather than diligently representing her interests, allowed her grievance to "needlessly languish for years" due to the union's failure to meet the grievance procedure timeline outlined in the CBA, failed to keep her apprised of the status of her grievance, and settled her claim without her knowledge or approval on unfavorable terms. This conduct, the plaintiff alleges, was highly prejudicial and constituted gross negligence. We disagree.

"A union has a duty to represent its members fairly in connection with issues that arise under a collective bargaining [agreement]." National Ass'n of Gov't Employees v. Labor Relations Comm'n, 38 Mass. App. Ct. 611, 613 (1995). In discharging this duty, unions are vested with considerable discretion to utilize a "wide range of reasonableness" in determining whether to pursue a grievance. Graham v. Quincy Food Serv. Employees Ass'n & Hosp., Library & Pub. Employees Union, 407 Mass. 601, 606 (1990), quoting Baker v. Local 2977, State Council 93, American Fed'n of State, County, & Mun. Employees, 25 Mass. App. Ct. 439, 441 (1988). This discretion "is exceeded when the union's conduct is arbitrary,

discriminatory, in bad faith, or (and this may be a variant on arbitrary conduct) grossly inattentive or grossly negligent." National Ass'n of Gov't Employees, 38 Mass. App. Ct. at 613.

Here, the union processed the plaintiff's grievance through step three of the four-step process before ultimately settling the claim with the plaintiff's reclassification into a higher paid position with some back pay. Although the process took considerably longer than that contemplated by the grievance procedure, there is no indication in the record that the plaintiff was injured by the delay. Contrast United Steelworkers of Am., 74 Mass. App. Ct. at 662-664 (union's representation caused employee to miss deadlines, depriving him of remedy). Likewise, although the union did not respond to every one of the plaintiff's communications, the record reflects that it did give her periodic updates of the status of her claim including its pursuit of settlement, and that any lapses in communication did not compromise her position. Contrast National Ass'n of Gov't. Employees, 38 Mass. App. Ct. at 613-614 (union failed to respond to employee's inquiries regarding claim, while failing to process it at all).

With respect to the settlement, notwithstanding the union's failure to involve the plaintiff in its negotiation, the union was able to obtain a classification into a higher paid position with some back pay. Although the plaintiff contends that the

union settled her claim for a "fraction of its value," the board could reasonably find that the union made a reasoned judgment to forego the risk of arbitration, given its experience in these sorts of claims, in favor of a secure result favorable to the plaintiff. See Peabody Fed'n of Teachers, Local 1289, AFT, AFL-CIO v. School Comm. of Peabody, 28 Mass. App. Ct. 410, 415-416 (1990) (settlement by union of member's claim short of that to which member claimed entitlement did not warrant intervention where claim was unsupported by showing that "union ha[d] sold the member out in some invidious, arbitrary, or unfair fashion"). Here, there was no evidence that the union's settlement of the grievance was improperly motivated. See Baker, 25 Mass. App. Ct. at 441 (unions permitted "wide range of reasonableness" in representing employees and are vested with considerable discretion not to pursue grievance as long as actions are not improperly motivated). Contrast Graham, 407 Mass. at 609-610 (history of hostility and animosity between member and union officials concerning running of union arguably tainted handling of member's grievance).

Given the limited scope of our review on appeal, we cannot conclude that the board's decision was unsupported by substantial evidence, marred by legal error, or otherwise

arbitrary, capricious, or an abuse of discretion.

Decision of the Commonwealth Employment Relations Board affirmed.

By the Court (Desmond, Ditkoff & Singh, JJ.[3]),

Joseph F. Stanton

Clerk

Entered: October 26, 2020.

[3] The panelists are listed in order of seniority.